INDEX.

771837—47——1

Pages

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 50

JESSE M. DONALDSON, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

READ MAGAZINE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER ON REARGUMENT

This brief is filed pursuant to this Court's order of November 17, 1947, restoring the case to the docket for reargument and requesting discussion of the following questions:

1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including the editor-in-chief? If so—

(a) Is the order within the Postmaster General's authority under 39 U. S. C. sections 259, 732?

(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so—

(a) Is the order within the Postmaster General's statutory authority?

(b) If so, are those code provisions in conflict with the Constitution of the United States?

3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?

STATUTES INVOLVED

The statutes involved, 39 U. S. C. §§ 259, 732 (R. S. 3929, 4041, as amended by the Act of September 19, 1890, c. 908, §§ 2, 3, 26 Stat. 465, 466, and by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964), are set forth in Appendix A, *infra*, pp. 75–77.

PRESENT POSTURE OF THIS CASE

As this Court has been advised in the supplemental memorandum filed on behalf of petitioner, the Postmaster General on December 8, 1947,

revoked the order here involved in so far as it applied to mail and money orders addressed to "Facts Magazine; Henry Walsh Lee, Editor in Chief, Facts Magazine, and their offices and agents as such." This leaves the order outstanding against mail and money orders addressed to "Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor."

This partial revocation of the fraud order limits the order as closely as possible to mail relating to the puzzle contest and hence restricts the pertinence of the problems raised by this Court's order to two phases of the factual situation presented:

(1) The validity of the order in so far as it relates to the funds deposited in the Registry of the District Court. That court, simultaneously with the granting of the preliminary injunction, required respondents to deposit in the Registry of the District Court all money and the proceeds of all checks and money orders subsequently received by them as qualifying fees for participation in the Hall of Fame Contest, together with a list of the names and addresses of the persons who had remitted the money (R. 44–45). At the time of the granting of the permanent injunction, this impounding order was continued pending the disposition of the appeal of this cause (R. 56–57).

We are advised that at present there is impounded in the Registry of the District Court $51,240.33. If the contest is held to be fraudulent and the fraud order lawful, the sums impounded presumably would be returned to the senders.[1]

(2) The validity of the order in so far as it applies to the mail addressed to the Puzzle Contest and the Puzzle Contest Editor in the future. The advertising and rules of the contest instructed participants to address mail to "Puzzle Contest, Facts Magazine" (Exs. opp. R. 36), and the correspondence was in fact addressed to and signed by the Contest Editor (R. 97, 98, 99, 101, 102, 111, 114, 116, 118, 120, 121, 124, 134, 139).[2]

We submit that it is unnecessary for the Court to consider the legality of the revoked provisions of the original order. In the first place, the original order has never been operative since it was stayed by the District Court the day following its issuance, which stay is still in effect (R. 44–45, 57–58). Moreover, this suit is one for injunctive relief (R. 11–12), and any injunction granted would operate only *in futuro*. Thus, the fact that the original order had a broader application, extending to mail which might have had nothing

[1] Although the District Court's order does not so state, the obvious reason for the impounding order was to protect the senders and simultaneously to effectuate the fraud order *pro tanto* if respondents' scheme was ultimately held to be fraudulent.

[2] One letter was signed by "Facts Magazine by Henry Walsh Lee, Editor in Chief" (R. 112).

to do with the contest, is no longer of any consequence. It cannot be so applied in the future, and respondents need no injunctive relief as to that. It was not so applied in the past, inasmuch as the impounded fund consists entirely of money sent by participants in the contest and taken from mail unquestionably intended for, and presumably addressed to, the contest. The impounding order thus can stand upon the basis of the unrevoked provisions of the original fraud order. And, in any event, a disposition of this suit for an injunction cannot protect respondents against what has already happened in the past. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 181–182; *Love* v. *Griffith,* 266 U. S. 32, 34; *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 475–478; *Mills* v. *Green,* 159 U. S. 651, 653, 657–658; cf. *Ex parte James,* 287 U. S. 572.

Respondents have stated that they believe the Postmaster General's order of December 8 partially revoking the original fraud order to be a nullity. There can, however, be no question as to the Postmaster General's power to revoke, in whole or in part, his own orders directing postmasters not to deliver mail or to pay money orders. Cf. *Wright* v. *Securities and Exchange Commission,* 112 F. 2d 89, 96 (C. C. A. 2); *Sprague* v. *Woll,* 122 F. 2d 128 (C. C. A. 7), certiorari denied, 314 U. S. 669 (Interstate Commerce Commission); *American Chain & Cable Co.* v. *Federal Trade Commission,* 142 F. 2d 909 (C. C. A. 4); see, also, *Milk Wagon Drivers Union* v.

Meadowmoor Co., 312 U. S. 287, 298–299; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 570.

Nor does the fact that a suit to enjoin the enforcement of the original order is pending or that an injunction against enforcement is outstanding deprive the Postmaster General of his power to revoke. *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 333; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, 362; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218; *Norwegian Nitrogen Products Co.* v. *Tariff Commission*, 274 U. S. 106, 112. The partial revocation is not in violation of but entirely consistent with the injunction; it does not harm but rather benefits respondents by giving them *pro tanto* the relief they requested. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 375. Moreover, the present proceeding, being a suit to enjoin enforcement, is not an appeal from the order involved but a collateral attack upon it. Cf. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. It is not like a case involving the power of a lower court to alter its judgment when the case is pending on appeal to a higher tribunal, or of an administrative agency to change an order subject to judicial review under a statute transferring jurisdiction of the proceeding to the reviewing court upon the filing of an administrative transcript of record. Cf.

Ford Motor Co. v. *National Labor Relations Board*, 305 U. S. 364.[3] In *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610, a suit to enjoin denial of second class mailing privileges, the Postmaster General granted the application while the suit was pending. This Court affirmed the judgment of the Circuit Court of Appeals holding the case moot. This decision would seem to be applicable to the revoked portions of the original order in this case.

ANSWERS TO THE QUESTIONS

If, as we submit, the case is now to be considered as presenting only the factual situations referred to above, it is possible to answer most of the Questions asked by this Court without the necessity for elaborate discussion.

Question 1. The first question asked by the Court is whether the fraud order prohibits delivery of mail and money orders "to Facts Magazine and all its employees, including its editor-in-chief." In view of the partial revocation of the order, the answer to that Question is "No." It is therefore unnecessary to answer Questions 1 (a) and 1 (b), which are predicated upon an affirmative answer to Question No. 1.[4]

[3] In the *Ford* case the Court concluded (p. 370) that because of this statutory provision the Labor Board could not "withdraw its petition at its pleasure" but only with leave from the Circuit Court of Appeals, which had been granted.

[4] If the Court should find it necessary to determine the validity of the original order in so far as it applies to those persons as to whom the order has been revoked, the petitioner

Question 3. The Court's third question was whether the order could be modified so as to free it from statutory or constitutional objection, and by what procedure, if the order was assumed to be in conflict with the statutes or the Constitution.

Our answer to this is that the order can be so modified by several procedures, and that in fact it has already been so modified. In the first place, the order can be modified by the Postmaster General himself, either on application by an aggrieved party or on his own motion so long as the modification makes the order less rather than more stringent. The Postmaster General has frequently modified orders after their issuance at the request of the parties concerned, upon being satisfied that some of the names included were not essential to the elimination of the fraudulent use of the mails or that the party would cease engaging in the fraudulent undertaking. This procedure was for the first time embodied in a formal regulation on November 20, 1947 (cf. Section 51.28, 12 F. R. 7944),[3] but the regulation

would, of course, not object to a determination that that order was unduly broad, inasmuch as that is the view of the Postmaster General himself upon his consideration of the scope of the original order. This would mean that an order which went beyond what was necessary to prevent the effectuation of the fraud by prohibiting the receipt of segregable mail not related to the fraud went beyond what the statutes intended.

[3] "§ 51.28. *Revocation and modification of orders.* Any person or concern against whom a fraud, lottery, or fictitious name order has been issued may file application for the revocation or modification of such order by the elimination there-

was only a publication of the preexisting procedure. See letter from Postmaster General, Appendix B, *infra*, pp. 78–81.

Secondly, we believe that if a court, in a proceeding to enjoin enforcement of the order, deems a particular portion of the order unlawful, it can enjoin enforcement of the order to that extent, and thus, in effect, modify the order.

We assume that the most serious objection to the original order was that it applied to mail addressed to Facts Magazine, its editor-in-chief, and all its employees, which would normally not be mail relating to the fraudulent puzzle contest. The order has already been modified so as to obviate this objection. We do not believe that

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from of any name or names against which the provisions of the order apply. The application should be addressed to the Solicitor of the Post Office Department, Washington 25, D. C. The applicant must make a sworn statement to the effect that the unlawful enterprise against which the order is directed is no longer being conducted under the name or names sought to be relieved of the provisions of the order and that the unlawful scheme will not be resumed in the future under such names or any other names. If, after investigation and consideration of such application, it shall appear that the application has been made in good faith and that the granting thereof will not result in further operation of the unlawful enterprise involved, the Solicitor may recommend to the Postmaster General revocation of the fraud, lottery, or fictitious name order in question or so much thereof as may be proper under the facts of the particular case and the exigencies of properly enforcing the postal laws involved therein. Applications will be promptly considered and will be handled as expeditiously as practicable and with due recognition of the pertinent circumstances and the nature of the business involved."

771837—47——2

any further modification is required, but if the Court is of a different view, the procedures just referred to are available.

Question 2. The first part of the Court's second question is: "Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based?" This question must be considered in three aspects—whether the prohibition applies (a) to other subject matters, (b) to other contests, and (c) indefinitely.

(a) We believe that in its present form the order does not apply to mail and money orders relating to other subject matters than puzzle contests, for the modified order prohibits the delivery only of mail which is addressed to the Puzzle Contest or the Puzzle Contest Editor. Mail concerned with other aspects of the magazine's activities would not be so addressed, nor would it be likely that personal mail would be addressed to Miss Johnson in her capacity as "Contest Editor." The possibility of this is not sufficiently great to affect the validity of the order.

(b) The order would have the effect of prohibiting the delivery of mail addressed to the Puzzle Contest Editor if subsequent contests were conducted and if contestants were instructed to address mail to "Puzzle Contest" or "Puzzle Contest Editor," or Miss Johnson in the latter capacity. We do not know, of course, at this time,

whether respondents intend to conduct other puzzle contests, or, if they do, whether they will give the same mailing address for them.

(c) The order is indefinite in duration. It would obviously be impracticable to place any definite time limit upon the fraud order if it is to accomplish its purpose. Furthermore, the record as to respondents' prior contests indicates respondents' propensity to engage in this type of fraudulent conduct. See petitioner's brief on original argument, pp. 5, 8, 17–18. Under such circumstances courts of equity traditionally issue injunctions indefinite in duration and cast the burden upon the party who has engaged in the course of unlawful conduct to apply for modification when circumstances so justify. Cf. *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 436–438; *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 386–393.

As to items (b) and (c), moreover, it is important to note that although the Postmaster General's order extends indefinitely to mail addressed to respondents' Puzzle Contest and Puzzle Contest Editor, it is subject to modification upon application and a showing by respondents that they are no longer engaged in contests or other schemes which are fraudulent. Under the recent regulation formalizing preexisting procedure (pp. 8–9, *supra*), the person against whom a fraud order has been entered may apply for revocation or

modification of the order by filing a sworn statement that the unlawful enterprise is no longer being conducted and will not be resumed in the future. If, upon investigation and consideration, the Postmaster General is satisfied that the application has been made in good faith, the order may be revoked in whole or in part.* This means that if respondents can make a showing that they do not intend to engage in the future in fraudulent puzzle contests, the order presently existing could be completely revoked. We think it clear, however, that it would be *perfectly* proper for the Postmaster General to maintain the present order in effect against respondents' Puzzle Contest Department if respondents manifest an intention to continue to conduct fraudulent puzzle contests.

There remain for consideration Questions 2 (a) and (b)—whether the order is within the Postmaster General's statutory authority and, if so, whether the statutory provisions are in conflict with the Constitution. We can conceive of no basis for arguing that the order in its present form does not come within the Postmaster General's authority under the statutes, if we assume that respondents' scheme was a fraudulent one,—

*The statement of this Court in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 298, with respect to the duration of a "permanent" injunction granted by a court of equity is thus applicable to the orders of the Postmaster General; the Court there stated: "Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted."

and we believe that we are entitled so to assume in answering the questions asked by the Court. That leaves for consideration Question 2 (b) as to the constitutionality of the statutory provisions, as so construed. The remainder of this brief will be devoted to a discussion of that question.

The constitutional question itself may have two aspects: (1) Whether the statutes are invalid in so far as they authorize the action taken by the Postmaster General in this case, and (2) whether the statutes are invalid *in toto*, so that no valid order can, under any circumstances, be entered under them. It is not clear that the Court intends from its Questions that the parties discuss the constitutionality of the statutes on their face, apart from their application in this case. The terms of the Questions suggest that the Court was concerned with the validity of the statutory provisions as here sought to be applied, and that it did not intend to reopen for fresh consideration the question whether statutory provisions which are of such long standing and which had been held valid over forty years ago are entirely void. Inasmuch as the Questions are not clear as to this, however, it seems desirable that we deal with that issue.

The difference between the two issues, is, in our opinion, quite narrow. This will appear from a consideration of the meaning of the statutory provisions.

THE MEANING OF THE STATUTORY PROVISIONS

The statutory provisions involved in terms empower the Postmaster General to require the return of all mail and the non-payment of all money orders addressed to persons found to have been engaged in conducting a scheme for obtaining money through the mails by fraud. But since "the single policy of these sections is to protect the public from fraudulent practices committed through the use of the mails * * * not * * * to impose personal punishment on violators" (*Commissioner* v. *Heininger*, 320 U. S. 467, 474), it is reasonable to construe the statutory provisions as authorizing the stoppage of mail only to the extent necessary to protect the public against the fraud. This would mean that although in terms the statutes might permit the Postmaster General to halt the delivery of all mail directed to a person conducting a fraudulent scheme, an all-inclusive fraud order would not be warranted if segregation of the mail connected with the fraud from other mail is possible.

In many instances, of course, segregation is not possible, inasmuch as the Postmaster General is precluded by specific statutory provisions from authorizing the opening of mail before its delivery. Indeed, this Court has implied that the Constitution forbids the opening of sealed mail. *Ex parte Jackson*, 96 U. S. 727, 735. That being so, the Postmaster General is undoubtedly author-

ized to issue orders against such intermingled mail which will prevent further use of the mails to defraud, even if this may reach innocent material. This Court squarely so held in *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510. The point is discussed more fully *infra*, pp. 34–39, 63–65.

It is not necessary that this statutory authority extend to the stopping of all mail addressed to a person or concern which, in a segregable aspect, is conducting a fraudulent scheme. The statutes have generally been applied by the Post Office Department to mail as closely confined to the fraudulent enterprise as was practicable. Both with respect to lotteries and fraud orders the Department has been generally concerned only with enterprises which are unlawful either in their entirety or in their primary aspects.[1] Although cases such as this do occasionally arise in which orders are issued against a business which is fraudulent in only one phase of its operation, such cases can normally be disposed of without the necessity of a sweeping fraud order. Thus, in the case referred to in the Monograph of the Attorney General's Committee on Administrative Procedure, in which the Postmaster General had issued an order against a

[1] Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Part 12, Monograph on Post Office Department, Sen. Doc. 186, 76th Cong., 3d sess., pp. 16–17; letter from Postmaster General, Appendix B, *infra*, pp. 78–82.

business which was for the most part legitimate, the order was subsequently revoked upon the submission of a stipulation to discontinue the fraudulent portion of the business. Another illustration is a case (Post Office Department F. & L. Docket No. 13/120) in which a citation was issued against a large New York department store for advertising and selling a worthless obesity cure by mail. The citation was vacated upon receipt of assurance that the unlawful advertising and sale of the cure would be discontinued. See pp. 81–82, *infra*. The Post Office Department has advised us that if there had been disagreement in such a case the fraud order would have been limited to mail directed to the particular department of the store involved in the advertisement. Only if segregation is impossible will the order extend to innocent portions of a business.

This does not mean that the Department has in no instance issued an order which, judged by the above standards, is unduly broad; the instant case itself shows the contrary. But, as in the present case, when an issue is raised as to the breadth of the order the Department has endeavored to limit the order to the extent necessary to stop the fraudulent scheme. In the usual case this can be accomplished by accepting a stipulation from the respondent to cease the fraudulent portion of his business and to return

the fraudulently obtained remittances.[8] Where this is not possible, and where the matter is called to the Department's attention, its practice would be to limit the fraud order to the fraudulent portion of the respondent's activities if that could be done. See letter from Postmaster General, Appendix B, *infra*, pp. 78–82.

We believe that the statute can reasonably be construed as embodying the construction which we are suggesting and which the Postmaster General places upon it.[9] If the statutes are so interpreted the only difference between this case and others which might arise is that here it is possible to segregate the mail related to the fraudulent scheme whereas in other cases it might not be. But as long as the statutes are construed as empowering the Postmaster General to issue orders as closely confined to the fraudulent scheme as the particular case permits, the constitutional problem would seem to be substantially the same.

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[8] See Attorney General's Committee on Administrative Procedure, Monograph, p. 17.

[9] If the Court would otherwise have doubt as to the constitutionality of the statutory provisions, they should, of course, be given that construction which will preserve the statutes' validity. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408; *The Abby Dodge*, 223 U. S. 166; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350; *Crowell* v. *Benson*, 285 U. S. 22; *Wright* v. *Vinton Branch Bank*, 300 U. S. 440; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Screws* v. *United States*, 325 U. S. 91, 105.

ONLY THE CONSTITUTIONALITY OF THE STATUTES AS HERE APPLIED IS BEFORE THE COURT

In any event we think this analysis indicates that each case should be treated on its own facts, that some applications of the statutes are clearly constitutional, and that the statutes should not be held wholly void even if it be assumed that in some cases, which rarely arise, they might be carried too far.

This Court has frequently affirmed its "considered practice not to decide * * * any constitutional question in advance of the necessity for its decision * * *, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * *" *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 90 n.; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129. In rejecting the argument that because some applications of the National Labor Relations Act might be invalid the entire Act must fall, the Court stated that this contention "seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press* v. *National*

Labor Relations Board, 301 U. S. 103, 132; see also *Crowell* v. *Benson*, 285 U. S. 22, 62; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* 301 U. S. 1, 30.

This well-established principle was applied to the very problem now before the Court in *Public Clearing House* v. *Coyne*, *supra*. In addition to holding the fraud order legislation valid even if it reached some private mail, the Court held that the issue of interference with private mail could not be raised, since not presented by the facts of the case; in this connection the opinion states (194 U. S. at 510–511):

> Another answer to this argument, which seems to be conclusive, is that the fraud order in this case is not open to this objection, as the Postmaster General only forbids the postmaster at Chicago to pay any postal money orders, drawn to the order of the League of Equity and the Public Clearing House, or their officers or agents in their capacity as such, and to inform the remitter of any such postal money order that payment thereof has been forbidden, etc., and "to return all letters, whether registered or not, or other mail matter which shall arrive at your office directed to such concerns or their officers or agents as such, to postmasters at the office at which they were originally mailed." There is nothing in the order thus worded that would authorize the postmaster at

Chicago to return letters addressed to an individual unless addressed to such individual as officer or agent of the League of Equity of the complainants. There is nothing in this order that would authorize the interference with the private or domestic mail matter of individuals.

We submit that this Court is only required to pass upon the constitutionality of the Code provisions here involved in so far as they are sought to be applied in this case.

SUMMARY OF CONSTITUTIONAL ARGUMENT IN ANSWER TO QUESTION 2 (B)

The statutory provisions here involved have been in effect for three-quarters of a century, and have been held constitutional by this Court on several occasions.

I

Under the postal power Congress possesses the authority to police the mails in the public interest, at least to the same extent that it may police the channels of interstate commerce. The prevention of the use of the mails to defraud is undoubtedly a legitimate exercise of this regulatory power. And the returning to the sender of mail addressed to the defrauder is the most effective means of protecting the victimized public. Merely to punish the defrauder would be to lock the barn long after the horse had been stolen. Inasmuch as it may be impossible to segregate mail connected with the fraud from other mail

when the defrauder has not used a separate address for the former, Congress must possess the power to halt all commingled mail if it is to deal adequately with the fraud. Congress possesses the power to select means which will fully effectuate the exercise of its constitutional power even as against such commingling, particularly when the recipient possesses the power to establish a separate address for the mail connected with the fraud.

II

The statutory provisions do not violate the First Amendment. That Amendment, of course, does not apply to the refusal to pay postal money orders authorized by Section 732. And it is also clear that the Amendment does not protect fraudulent statements, and fraudulent commercial advertising in particular. Many cases establish that commercial advertising—even if not fraudulent—is not the kind of speech at which the First Amendment is directed. See especially, *Valentine* v. *Chrestensen*, 316 U. S. 52; *Jamison* v. *Texas*, 318 U. S. 413, 417; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110–111, and cases under the Federal Trade Commission Act.

The principle that the First Amendment prohibits "previous restraints" on speech is inapplicable. The cases under the Federal Trade Commission Act and other statutes demonstrates that the publication of fraudulent statements may

be enjoined, and even that advance licensing may be required for the distribution of advertising, whether or not fraudulent. The previous restraint doctrine is not an absolute one, and the public interest in preventing fraud is so great, as contrasted with the interest in safeguarding the type of written statements here concerned, as to bring the statute within the recognized exceptions to the previous restraint rule.

The fact that the fraud order applies to incoming mail rather than to the fraudulent advertising itself is not material. In so far as the recipient of the mail in concerned, he has no constitutional right to receive mail connected with his fraudulent scheme or mail which, because of his own conduct, cannot be separated therefrom. Moreover, he has no standing to rely on any theoretical interference with the constitutional rights of the senders of the mail, who are primarily his victims and who are the very persons whom the fraud order protects; significantly, they are not complaining here. In any event no constitutional rights of the senders are infringed. Firstly, the incoming mail, though innocent in itself, is an integral and essential part of the fraudulent scheme, and is as subject to governmental interception, as, for example, ransom payments. Secondly, the incoming mail is itself commercial in nature, inasmuch as it will consist of replies to respondent's advertisement

which are indistinguishable in their relation to the commercial enterprise from orders or inquiries sent in by customers in response to the advertising in a mail order catalogue.

And apart from this the First Amendment guaranties are not absolute. In a great many circumstances this Court has balanced the effect of a substantive regulation upon the essential freedom which the First Amendment preserves as against the public interest safeguarded by the regulation. Here the statute protects the public against fraud; on the other hand, the interference with the freedom of communication of the senders is narrowly confined to letters sent to a single address, most of which are related to the fraudulent scheme. There is thus no consequential impairment of their freedom of expression to counterbalance the benefit to the public—which consists largely of themselves—resulting from this most effective means of preventing fraud. These principles apply even if we assume that some mail unrelated to the fraud will also be returned to the senders as a result of commingling.

III

The fraud order statutes do not violate the due process clause of the Fifth Amendment since they are reasonable exercises of the legislative power to prevent the use of the mails to defraud. This is clearly true although the statutes operate

upon the mail addressed to the defrauder and upon innocent incoming mail commingled with that related to the fraud.

IV

The Fourth Amendment is irrelevant here since there is no search and seizure but a return of the unopened letters to the senders to whom they belong. The Sixth and Eighth Amendments and Article III, Section 2, Paragraph 3 are inapplicable, since they relate only to criminal cases. The fraud order statutes are designed to protect the public, and they do not become criminal sanctions because their effect may be to damage the perpetrator of the fraud.

THE CONSTITUTIONALITY OF THE STATUTORY PROVISIONS

Historical Background and Direct Precedents

The first predecessors of the statutory provisions here involved (now 39 U. S. C. Sections 259, 732), enacted in 1872 (17 Stat. 322, 323), authorized the Postmaster General to order the non-delivery of registered mail and the non-payment of money orders to persons he found to have conducted lotteries or schemes to obtain money by fraud through the mails. In 1895 the prohibition was extended from registered mail to all letters and other mail matter. 28 Stat. 963–964.

During the thirty-odd years following 1872 these statutory provisions were applied by the lower courts in a number of cases.[10] Their constitutionality first came before this Court in 1902, in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, but the Court, assuming constitutionality, decided the case on other grounds without reaching the constitutional issues. In 1904, however, the Court passed upon the constitutional question in *Public Clearing House* v. *Coyne*, 194 U. S. 497, in which the statutes' validity was carefully considered and upheld. In *Leach* v. *Carlile*, 258 U. S. 138, the Court again gave effect to the statutory provisions. No constitutional objections had been raised by the parties, nor were any constitutional points argued. Nevertheless, Mr. Justice Holmes

[10] *Dauphin* v. *Key*, 11 D. C. (1 MacArthur and Mackey) 203 (1880); *New Orleans Nat. Bank* v. *Merchant*, 18 Fed. 841 (E. D. La. 1884); *Enterprise Sav. Ass'n* v. *Zumstein*, 64 Fed. 837 (S. D. Ohio, 1894), affirmed, 67 Fed. 1000 (C. C. A. 6, 1895); *Hoover* v. *McChesney*, 81 Fed. 472 (D. Ky., 1897); *Fairfield Floral Co.* v. *Bradbury*, 89 Fed. 393 (D. Me., 1898); *American School of Magnetic Healing* v. *McAnnulty*, 102 Fed. 565 (W. D. Mo.), reversed, 187 U. S. 94; *Missouri Drug Co.* v. *Wyman*, 129 Fed. 623 (E. D. Mo., 1904). Obviously this statute was applied in many instances which did not result in litigation. In an opinion to the Postmaster General, 21 Op. A. G. 313, February 24, 1896, the Attorney General, in holding a certain "bond and investment" company to be a lottery referred to "* * * the myriad of such companies which were springing up all over the country until they were checked by your action in refusing them the use of the mails" (p. 315).

(who had concurred in *Public Clearing House* v. *Coyne*) and Mr. Justice Brandeis dissented on the ground that the statutes contravened the First Amendment, although their opinion notes (p. 140) that "the statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision." In the lower courts, before, and of course after, the *Public Clearing House* decision, the validity of the statutes has been upheld or assumed in a great many cases which it is unnecessary to cite.

We thus are dealing with statutory provisions which have been in force for seventy-five years, and which were held constitutional by this Court over forty years ago, and again twenty-five years ago. Although this, of course, is not in itself decisive of a constitutional question, particularly in view of the dissent of two most distinguished Justices, we submit that the judicial understanding for three-fourths of a century in dealing with a statute designed to protect the public against fraud is entitled to great weight. Moreover, apart from these direct precedents, we submit that the statutory provisions, particularly as here applied, are constitutional.

I

THE STATUTORY PROVISIONS HERE INVOLVED ARE A VALID EXERCISE OF THE POSTAL POWER[11]

A. UNDER THE POSTAL POWER CONGRESS MAY REGULATE THE USE OF THE MAILS IN THE PUBLIC INTEREST

It is by now well established that Congress possesses the authority to prohibit the use of the mails not only by products which might be physically dangerous to the postal service (such as explosive, inflammable or pestilent material), but also by matters regarded by Congress as deleterious to the public health, morals and welfare. See *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407. As Mr. Justice Brandeis recognized in his dissenting opinion in the case last cited (255 U. S., at 430):

> The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regu-

[11] The questions of violation of the First, Fifth and other Amendments, are considered in Points II, III and IV, *infra*.

lations are quite unrelated to the business of transporting mails.

It is unimportant for present purposes to determine whether this power to police the mails exists because the Government is the proprietor of the business of carrying the mails and need not transport what it chooses not to transport, or because the postal power gives to Congress regulatory authority over the mails. All of the cases cited are consistent with either theory. Certainly the cases upholding the statutes which are directed to protecting the public against the use of the mails by swindlers are appropriate as exercises of the police power over the mails, and with respect to them it is unnecessary to argue that "the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever." See *Hannegan* v. *Esquire,* 327 U. S. 146, 156; *Pike* v. *Walker,* 121 F. 2d 37 (App. D. C.), certiorari denied, 314 U. S. 625.

We think that in any event Congress possesses at least as much power "to forbid the use of the mails in aid of the perpetration of crime or immorality" (*In re Rapier,* 143 U. S. 110, 134), as to regulate interstate commerce to the same end.[12] And it has long been established that Con-

[12] "This power probably may be regarded as even more comprehensive than that exercised over interstate commerce, for the government's interest in the mails is proprietary as well as regulatory." *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 92 F. 2d 580, 588 (C. C. A. 2),

gress possesses the authority to deny the facilities of interstate transportation to products or persons even though such prohibitions "have the quality of police regulations". *Seven Cases of Eckman's Alterative* v. *United States,* 239 U. S. 510, 515; *United States* v. *Darby,* 312 U. S. 100, 114; *Hoke* v. *United States,* 227 U. S. 308, 322; *United*

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affirmed, 303 U. S. 419. The reasons for this are well stated in Cushman, *National Police Power Under The Postal Clause of the Constitution*, 4 Minn. Law Rev. 402, 420 (1920):

"If Congress possesses such police power by reason of its authority over a commerce which it does not create but merely regulates, it cannot be doubted that equal or even greater authority would be derived from the power to 'create' or 'establish' a postal system. It may be urged, in fact, that while the constitutional authority arising from the commerce and postal clauses is ample in both cases to support this type of legislation, a much stronger moral obligation rests upon Congress to protect the public health, morals, safety, and general welfare from the misuse of the mails than from the misuse of the facilities of interstate commerce. Two considerations support this view. The first is that the responsibilities arising from the fact of creation, ownership, and operation of an institution may be reasonably regarded as greater than those arising from a power merely to 'regulate' a system or institution which Congress did not create, does not own nor operate, and cannot destroy. The second is that the ordinary individual is in a much better position to protect himself from the misuse of interstate commerce than from the misuse of the mails. This is due to the essential differences between the two systems. Under normal circumstances the participation of the individual in the transactions of interstate commerce and his relations to interstate carriers result from a voluntary contractual relationship. Spurious or even harmful products may be sent to him, but rarely without his having bargained for the shipment of any products at all. A very different situation exists with respect to the

States v. *Carolene Products Co.*, 304 U. S. 144, 147; *Lottery Case*, 188 U. S. 321; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

This power to regulate the mails for what may be regarded as police purposes—that is, the protection of the "public health, morals or welfare" (*United States* v. *Darby*, *supra*),—has frequently been exercised under the postal power as well as under the commerce power. Thus statutes are designed to exclude from the mails not only matter intended to defraud the public,[13] but obscene matter, [14] lottery tickets,[15] transactions in commodity futures except through boards of trade properly designated by the Secretary of Agriculture,[16] unregistered securities and securities not accompanied by a proper prospectus,[17] an improper prospectus,[18] the manipulation of secu-

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postal system. At practically negligible cost to the sender, grossly indecent letters or papers could be brought several times a day to the door of any person by an employee of the United States government and this without the previous knowledge and against the wishes of the recipient. Without depriving himself of all the conveniences arising from the regular visits of the postman a person might be quite unable to protect himself against this sort of abuse. It is not unreasonable to assert that the governmental authority which thus penetrates daily the very homes of the people must recognize a commensurate duty of protecting those homes from the distribution of noxious matter."

[13] 35 Stat. 1130, 18 U. S. C. 338.

[14] 35 Stat. 1129, as amended, 18 U. S. C. 334.

[15] 35 Stat. 1129, 18 U. S. C. 336.

[16] 42 Stat. 999, as amended, 7 U. S. C. 6.

[17] Securities Act, 48 Stat. 77, 906, 15 U. S. C. 77e.

[18] Securities Act, 48 Stat. 77, 906, 15 U. S. C. 77e.

rity prices with respect to securities listed on national exchanges, the use in connection with security dealings of deceptive devices, the use of proxies except in accord with proper regulations, the purchase or sale of securities over the counter except by registered brokers or dealers,[19] transactions by unregistered public utility holding companies and other described acts of such companies.[20]

These statutory provisions are unquestionably constitutional. *In re Rapier,* 143 U. S. 110, 134–135; *Badders* v. *United States,* 240 U. S. 391, 393; *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 442; *Jones* v. *Securities and Exchange Commission,* 79 F. 2d 617 (C. C. A. 2), reversed on other grounds, 298 U. S. 1; *Knowles* v. *United States,* 170 Fed. 409 (C. C. A. 8); *Rebhuhn* v. *Cahill,* 31 F. Supp. 47, 49 (S. D. N. Y.-three judge court); *Securities and Exchange Commission* v. *Torr,* 15 F. Supp. 315, 318–319 (S. D. N. Y.), reversed on other grounds, 87 F. 2d 446 (C. C. A. 2).

B. THE FRAUD ORDER STATUTES ARE A LEGITIMATE EXERCISE OF THE POSTAL POLICE POWER

Inasmuch as Congress possesses a police power over the mails, it undoubtedly possesses the power

[19] Securities Exchange Act, 48 Stat. 881, 885, 889–891, 895, 904, 15 U. S. C. 78e, 78i, 78j, 78n, 78o and 78dd.

[20] Public Utility Holding Company Act, 49 Stat. 803, 812, 814, 817, 823, 825, 827, 15 U. S. C. 79d, 79f, 79i, 79k (g), 79l and 79m (a) (b) (e) (f).

to prevent the use of the mails to defraud. This is established by the numerous cases giving effect to the statute imposing criminal penalties for fraudulent use of the mails (Crim. Code, sec. 215, 18 U. S. C. 338). Many of the statutes cited above police both the facilities of interstate commerce and the mails in order to protect the public against deception. Perhaps the closest parallel is the Federal Trade Commission Act, which, prior to its amendment in 1938, prohibited false advertising in interstate commerce (e. g., *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112), but which was amended in that year so as to apply both to dissemination through interstate commerce and the mails. 52 Stat. 114, 15 U. S. C. 52.

1. *As applied to incoming mail*

The primary difference between the fraud order statutes and the other measures to which we have referred is that the former prevent mail from reaching the person engaged in the deceptive conduct, whereas the other statutes make it unlawful for him to use the facilities of commerce or the mails. But the one is obviously as reasonable a method of preventing the use of the mails to defraud as the other. Indeed, it is the only method of protecting the public against mail fraud which will

be fully effective, inasmuch as it is impossible physically to prevent a defrauder from depositing letters relating to his fraud in some of the thousands of mail boxes throughout the country. Furthermore, the government is never in a position to act until after the false representations have been published and distributed; stopping of future mailing of the misrepresentations will not protect that portion of the public which is responding to the prior publications.

The object of the fraud order provisions, as this Court recently stated in *Commissioner* v. *Heininger* "is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators". 320 U. S., at 474. The penal statutes may be sufficient in so far as punishing the defrauder himself is concerned, but inasmuch as such punishment occurs long after the event, it does not prevent the consummation of the fraud. The public is thus not adequately protected if the swindler is permitted to receive the proceeds of his fraudulent scheme through the mails up until such time as he may be imprisoned. And, of course, once he receives the proceeds of his unlawful activity, it is impossible for the victims to recover what they have unwittingly been duped into paying.

The fraud order statutes protect the victims of the fraud by requiring that mail addressed

to the swindler be returned to the senders. Inasmuch as neither criminal provisions, which only lock the barn long after the horse has disappeared, nor prohibitions against mailing, which could not be as effectively enforced, would adequately accomplish this purpose, it clearly was not unreasonable for Congress to use the one effective device available to it in protecting the innocent public from the use of the mails to defraud.

This is especially important, because of the vast amount of business transacted through the mails and of the ease with which the mails may be used to defraud unless they are adequately policed. For the swindler using the mails need never meet his victim; he can remain in a distant part of the country and spread his lies broadside in the knowledge that some persons will be duped. The number of fraudulent schemes perpetrated through the mails is, of course, immeasurable, but there can be no question that it has been tremendous.[21]

2. *As applied to commingled mail*

It may be said that the statutory provisions go too far because they may reach private mail or other mail matter having nothing to do with the fraudulent scheme. Inasmuch as the order involved in this case does not extend to mail or moneys not related to the puzzle contest, this issue is not

[21] See *Crane* v. *Nichols*, 1 F. 2d 33 (S. D. Tex.); American Medical Association, *Medical Mail-Order Concerns* (1924); Baarslag, *Robbery by Mail* (1938).

now before the Court. See pp. 4–5, 7, 18–20, *supra*. Nevertheless, in view of respondents' attack upon the validity of the statutes as a whole, it seems advisable to show that this possibility of reaching mail not related to the fraud does not render the statutes invalid.

It is, of course, axiomatic that in executing its constitutional powers, Congress may adopt means which will make the exercise of its authority effective. We have shown that a reasonable —and indeed the most effective—means of protecting the public against the fraudulent use of the mails is to prevent the delivery to the swindler of incoming mail. This practicable and easily enforceable method of safeguarding the public could not be employed if it were permissible to halt only mail connected with the fraud. For in *Ex parte Jackson*, 96 U. S. 727, 735, it was implied that the Fourth Amendment proscribed the opening of mail prior to its delivery and the statutes do so specifically. As this Court stated in *Public Clearing House* v. *Coyne*, 194 U. S. at 510, in discussing this precise question:

> Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the postmaster is denied permission to

> open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, *prima facie* at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts. * * *

The person who uses the mails to defraud, of course, has it within his power to establish a separate, segregable address for mail related to the fraudulent scheme. If he knew that a fraud order could not be issued if such mail and innocent mail might both be sent to the same address, he not only would have no incentive to establish addresses which would permit segregation but a very strong incentive not to do so. By using his home address, to which private mail might be delivered, or a business address to which

mail not relating to the fraud might also be sent, he would thus completely free his scheme from the otherwise effective means of protecting the public created by the statutes. On the other hand, if the statutes apply to all mail where the mail is intermingled, as the *Public Clearing House* case holds they do, it is possible for a swindler to protect his private or innocent communications by the use of a separate trade name or a separate address for the fraudulent scheme. Furthermore, even after a fraud order has been entered against him, a swindler may apply to the Postmaster General for relief as to addresses not necessarily involved in the fraudulent scheme. In a great many instances in the past, even prior to the new regulation, the Postmaster General has, on application, revoked orders in so far as they affected the personal name of a respondent or a personal address.[22]

It is, of course, established law that the power of Congress over a subject matter cannot be defeated because of the impossibility of separating that which Congress may regulate from transactions not otherwise subject to federal authority. A familiar exercise of such power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled." *United States* v.

[22] See letter, Appendix B, *infra*, pp. 79–80.

Darby, 312 U. S. 100, at 121, and cases cited. This principle clearly applies not only to such economic inseparability as was involved in the *Shreveport Case,* 234 U. S. 342, and *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110, but even more clearly to cases of physical inseparability (*Currin* v. *Wallace,* 306 U. S. 1; *Thornton* v. *United States,* 271 U. S. 414). And the principle, which is derived from the "necessary and proper" clause of the Constitution, is not limited to the commerce power but undoubtedly extends to the other powers of Congress (*McCullough* v. *Maryland,* 4 Wheat. 316; *Jacob Ruppert, Inc.* v. *Caffey,* 251 U. S. 264; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Westfall* v. *United States,* 274 U. S. 256, 259). The same principle is applicable to the various powers of the states (*Queenside Hills Co.* v. *Saxl,* 328 U. S. 80, 83; *Booth* v. *Illinois,* 184 U. S. 425; *Otis* v. *Parker,* 187 U. S. 606, 609; *St. John* v. *New York,* 201 U. S. 633; *Silz* v. *Hesterberg,* 211 U. S. 31; *Murphy* v. *California,* 225 U. S. 623; *Purity Extract and Tonic Co.* v. *Lynch,* 226 U. S. 192, 201–202).

Even apart from this familiar constitutional principle, the ordinary common law concept of confusion of goods demonstrates that the person who through his own fault causes articles to be commingled must suffer any loss which occurs as a result of the commingling. *The "Idaho",* 93 U. S. 575, 585–586; *Fiman* v. *State of South*

Dakota, 29 F. 2d 776 (C. C. A. 8), certiorari denied, 279 U. S. 841; *National Atlas Elevator Co.* v. *United States*, 97 F. 2d 940, 942 (C. C. A. 8); *Vest* v. *Bond Bros.*, 223 Ala. 552, 137 So. 392; *Barth Mercantile Co.* v. *Jaramillo*, 46 Ariz. 365, 51 P. 2d 252, affirmed on rehearing, 48 Ariz. 94, 59 P. 2d 328; *In re Thompson*, 164 Iowa 20, 29–30, 145 N. W. 76; *Ryder* v. *Hathaway*, 38 Mass. (21 Pick.) 298, 306. This is particularly true when otherwise a wrongdoer might escape responsibility for his misconduct by reason of the commingling.

For all of the above reasons we submit that the fraud order statutes are appropriate exercises of the postal power of Congress, even in so far as they apply to commingled mail unrelated to the fraudulent scheme.

II

THE STATUTORY PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT

Respondents assert that the fraud order statutes violate the First, Fourth, Fifth, Sixth and Eighth Amendments to the Constitution and also Article 3, Section 2, Paragraph 3. Of these only the First Amendment requires extended discussion.

A. THE PROHIBITION OF THE PAYMENT OF MONEY ORDERS DOES NOT VIOLATE THE FIRST AMENDMENT

Two statutory provisions are here involved, Sections 259 and 732 of Title 39 of the United States Code. Section 732 provides that the Postmaster

General may order that money orders drawn to or in favor of the person found to have engaged in fraudulent conduct shall not be paid but shall be returned to the remitters named in the money orders. Clearly the First Amendment does not protect any right to the receipt of money through the Post Office Department. The refusal to pay money orders in no way touches upon infringement of free speech or a free press; it has no connection with the dissemination of information, ideas and opinion which is within the protection of the First Amendment. Thus respondents' objections based upon the First Amendment are not applicable to Section 732. It should be noted, however, that this section does not reach all money forwarded by victims of the fraud but only postal money orders. Victims will not be protected as to sums sent in the form of cash or checks unless ordinary mail to the swindlers can also be intercepted.

B. THE FIRST AMENDMENT DOES NOT PROTECT A FRAUDULENT ADVERTISING SCHEME CONDUCTED THROUGH THE MAILS

Argument is not necessary to demonstrate that the First Amendment, which protects the freedom of speech and of the press, does not immunize fraudulent statements, whether oral or in writing. Although fraudulent representations inevitably take the form of oral or written statements, fraud may nevertheless be forbidden, both

by the national government acting within its constitutional sphere and by the states.

Here, moreover, we are not concerned with fraud in general, but with fraud as an ingredient of commercial advertising. As in the present case, a fraud order is almost invariably directed against fraudulent practices or schemes of persons who are engaged in commercial enterprises and are interested in their own profits. The imposition of such a restraint on commercial advertising to eliminate fraudulent practices, does not, we submit, violate the First Amendment, since commercial advertising, soliciting, canvassing, etc., taken alone, independently of whether it is fraudulent, is not the kind of "speech" which is protected by the First Amendment.[23] 1 Chafee, *Government and Mass Communications* (1947), pp. 25, 286, 291.

Although the "freedom of speech" guaranteed by the First Amendment is allowed the broadest scope, the principle that "sales talk"[24] and other purely commercial activity not directed at the dissemination of information or ideas do not enjoy the protection of that guaranty is so firmly

[23] "The court could have announced as a rule what is probably true, independent of judicial acceptance, that the freedom of the press does not include freedom of advertisement." Lindsay Rogers, *The Postal Power of Congress* (Johns Hopkins University Studies in Historical and Political Science, Series XXXIV, No. 2, 1916), p. 117. We do not suggest that the First Amendment is inapplicable to all discussion of commercial or economic activities. See *Thomas v. Collins*, 323 U. S. 516, 541, 545, 549.

[24] The term is Professor Chafee's.

rooted in our judicial system,[25] that it appears no longer to be open to question. Extensive research has failed to disclose any reported decisions holding the contrary, and as a matter of fact the question of freedom of speech as applied to commercial advertising is almost never raised. Usually the decisions which do consider constitutional problems in connection with prohibitions or regulatons directed against commercial advertising are concerned with deprivation of property or claims of discrimination. *Packer Corporation* v. *Utah*, 285 U. S. 105; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; *Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230; *Fifth Ave. Coach Co.* v. *New York*, 221 U. S. 467; *San Francisco Shopping News Co.* v. *South San Francisco*, 69 F. 2d 879 (C. C. A. 9), certiorari denied, 293 U. S. 606; *Green River* v. *Fuller-Brush Co.*, 65 F. 2d 112 (C. C. A. 10); *Commonwealth* v. *Kimball*, 299 Mass. 353; *People* v.

[25] It is clear that "speech" does not include all manner of discourse. Cf. *Chrestensen* v. *Valentine*, 122 F. 2d 511, 525 (C. C. A. 2) (Frank J. dissenting), reversed, 316 U. S. 52. In addition to the exclusion of sales talk and other commercial activity there are other classes of speech, "* * * the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572; *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310.

Johnson, 117 Misc. 133; *Coughlin* v. *Sullivan*, 100 N. J. L. 42; *Sieroty* v. *Huntington Park*, 111 Cal. App. 377; 1 Chafee, *Government and Mass Communications* (1947) pp. 25, 291; Lindsay, *Handbill Ordinances*, 39 Mich. L. Rev. 561, *passim*. It would appear that Judge Frank's statement in his dissenting opinion in *Chrestensen* v. *Valentine*, 122 F. 2d 511, 524 (C. C. A. 2), reversed, 316 U. S. 52, that "Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising" succinctly states the historical truth that the freedom of speech guaranteed by the First Amendment has throughout been associated with non-commercial literature and not with mere advertising matter. For, as this Court stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249–250, quoting from Judge Cooley: "'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's *Constitutional Limitations*, 8th ed., p. 886."

This Court, while affirming and protecting from encroachment the "freedom of speech" protected by the First Amendment, has simultaneously reaffirmed this firmly rooted principle that purely commercial advertising and canvassing is not

protected by that Amendment.[28] *Valentine* v. *Chrestensen*, 316 U. S. 52, squarely presented the question. In that case, respondent wished to distribute on the streets of New York City handbills advertising his former United States Navy submarine and soliciting visitors at a stated admission fee. Upon being advised by the Police Commission that such distribution would violate the prohibition in the Sanitary Code against distributing commercial and business advertising matter on the streets, he prepared double-faced handbills, one face of which was devoted to commercial advertising and the other to a protest against the denial of wharfage facilities at the city piers. These handbills the Police Commissioner also regarded as violative of the Sanitary Code, although he informed respondent that he (respondent) might freely distribute handbills solely devoted to information or public protest. Respondent then brought suit to enjoin the Police Commissioner from enforcing the applicable provision of the Sanitary Code against his distribution of these double-faced handbills. The court below by a 2–1 decision affirmed the order of the district court enjoining the Police Commissioner. The majority of that court, in addition to pointing out the difficulties involved in determining

[28] Lindsay, *Handbill Ordinances*, 39 Mich. L. Rev. 561 (1941) reviewing the authorities, makes clear the uniform assumption that commercial distribution is not protected by the First Amendment.

whether the purpose of the handbill was primarily commercial, relied on *Schneider* v. *State*, 308 U. S. 147, which it construed as invalidating absolute prohibitions on even purely commercial advertising while permitting reasonable regulation thereof. This Court, however, summarily reversed this decision and, construing the handbills as purely commercial advertising, held that they were without the protection of the First Amendment. In its unanimous opinion, the Court stated (316 U. S., at 54–55):

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.* Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference

> with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct. [Italics supplied.]

Although the facts and result in *Jamison* v. *Texas*, 318 U. S. 413, differed from the *Chrestensen* case, the problem there again involved the determination of the primary purpose of handbills, which were being distributed on the streets. One side of the handbill there involved was an invitation to attend a gathering of the Jehovah's Witnesses. On the other side, the invitation was repeated and two books were described explaining the Witnesses' interpretation of the Bible, followed by a statement that the books would be mailed "Postage prepaid on your contribution of 25¢." On behalf of the State of Texas, it was contended *inter alia* that the activity would be forbidden because the leaflets include "commercial advertising of books which the distributor is offering for sale." In rejecting that contention the Court, speaking through Mr. Justice Black, reaffirmed and distinguished the *Chrestensen* decision, saying (p. 417):

> The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets

may have "a civic appeal, or a moral platitude" appended. *Valentine* v. *Chrestensen*, 316 U. S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.

The Court went on to dispose of the difficulty encountered by the lower court in the *Chrestensen* case in regard to the *Schneider* case by pointing out that even if the handbills carrying a notice of a public meeting contained a statement of an admission fee, they do not thereby become commercial advertising outside the protection of the First Amendment. *Schneider* v. *State*, 308 U. S. 147, 154, 162, 163. This explanation obviously was intended in no way to limit or qualify the Court's statement in the *Schneider* case that its ruling there was "not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." 308 U. S., at 165. See Note, 53 Harv. L. Rev. 487, 488.

As a result of the fact that it is so well established that commercial advertising and other such activities are not protected by the First Amendment, the issues brought before the Court and passed on by it are formulated not in terms

of whether commercial activities are protected by that Amendment, but rather whether in the particular factual situation, the activities there presented are primarily commercial and hence outside the protection of the First Amendment, or involve an exercise of the freedom of religion or speech and thus are within that Amendment. This apparently was considered to be the general question confronting this Court in the cases involving the constitutionality of license taxes on book vendors as applied to members of Jehovah's Witnesses offering to sell religious tracts.

Thus in the first opinion in *Jones* v. *Opelika*, 316 U. S. 584, Mr. Justice Reed, writing for the majority of the Court which sustained the tax as valid, pointed up the problem by stating, after citing the *Chrestensen* case, that "when proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing." (316 U. S., at 597.) And both Chief Justice Stone and Mr. Justice Murphy, dissenting, indicated that although their conclusion differed from that of the majority, as far as they were concerned the question was whether the constitutional protection of the Bill of Rights may "be evaded by classifying with business callings an activity whose sole purpose is the dissemination

of ideas, and taxing it as business callings are taxed. The immunity which press and religion enjoy may sometimes be lost when they are united with other activities not immune," citing the *Chrestensen* case (316 U. S. at 608, 615, 619).

On rehearing, the judgments entered in *Jones* v. *Opelika* and its companion cases were vacated *per curiam,* and the municipal ordinances imposing the license taxes were held unconstitutional in the circumstances there presented. 319 U. S. 103. However, in the companion case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, which dealt with the same general factual situation and in which the ordinance was likewise held unconstitutional, the majority of the Court apparently still considered the basic issue before it to be whether the activity involved was religious and protected by the First Amendment, or commercial and hence outside that Amendment. Mr. Justice Douglas, writing for the majority, held that the activity was protected by the First Amendment. His opinion states (319 U. S., at 110–111):

> * * * Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day, in *Jamison* v. *Texas,* 318 U. S. 413, 417, "The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic

> appeal, or a moral platitude' appended. *Valentine* v. *Chrestensen,* 316 U. S. 52, 55." * * * As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. * * *

In *Martin* v. *Struthers,* 319 U. S. 141, 142n, the Court also noted that:

> This ordinance was not directed solely at commercial advertising. Cf. *Valentine* v. *Chrestensen,* 316 U. S. 52; *Green River* v. *Fuller Brush Co.,* 65 F. 2d 112.

We add only that while there may have been difficulties in drawing the line between religious and commercial activities in those cases, which involved the sale of religious literature, there is no such difficulty with ordinary commercial advertising.

Since commercial advertising, whether or not fraudulent, is not protected by the First Amendment, it follows *a fortiori* that restraints on fraudulent schemes sponsored by commercial enterprises likewise are not protected by the First Amendment. This is particularly true since the exploitation of consumers or the public through fraudulent practices is recognized as being contrary to public policy and subject to governmental limitation. "To fail to prohibit such evil practices would be to elevate deception in business

and to give it the standing and dignity of truth." *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116; see also *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 313; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306. It is presumably for this reason that the action taken by the Federal Trade Commission and the Food and Drug Administration against misleading advertising or misbranding has never even been attacked as an infringement of the freedom of speech guaranteed by the First Amendment. Many cases under those statutes attest to the fact that the Federal Government may prohibit false advertising or require accurate advertising or labelling (which amounts to the same thing) without in the slightest way contravening the guarantees of the First Amendment. E. g., *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; cf. *Federal Securities Administrator* v. *Quaker Oats Co.*, 318 U. S. 218.[27]

[27] Compare *Scientific Mfg. Co.* v. *Federal Trade Commission*, 124 F. 2d 640, 644 (C. C. A. 3), with *Perma-Maid Co.* v. *Federal Trade Commission*, 121 F. 2d 282 (C. C. A. 6). The *Scientific Mfg.* case held that the Federal Trade Commission Act did not apply to false representations representing the publishers' honest opinion as to a product with which he was not in competition, inasmuch as the representations were not intended to be utilized commercially to mislead or deceive the public. The court distinguished the *Perma-Maid*

C. THE FACT THAT THE FRAUD ORDER APPLIES TO INCOMING MAIL RATHER THAN TO THE FRAUDULENT ADVERTISEMENTS THEMSELVES IS NOT MATERIAL

We have heretofore sought to show that respondents' fraudulent advertising scheme is not protected by the First Amendment. In fact, of course, the fraud orders operate upon the letters addressed to the swindlers rather than directly upon the false advertising. As we have seen, this prohibition against the delivery of mail is much the most practicable and effective method of protecting the public against the fraudulent use of the mails.

1. *Respondents have no constitutional right to receive mail sent as a result of their fraudulent representations*

We submit that the First Amendment clearly does not protect the right of a defrauder to receive through the mails the funds [29] or other mail matter sent to him as a result of his false representations. The incoming mail contains the fruits of his fraud, and he should have even less right to complain that his freedom of communication is being interrupted so as to protect his victims than if the restraint

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case, which involved the identical representations when used by a salesman to induce customers to buy a particular product.

[29] The prohibition against the payment of money orders alone would not insure the return to the senders of sums obtained by means of the false representations inasmuch as many victims would transmit money either in cash or by check. See pp. 39–40, *supra*.

was on his own misrepresentation. The First Amendment does not prevent government officials from returning to the victims the proceeds of a fraudulent scheme before the defrauder can get his hand upon them.

It may be urged that this does not dispose of the case (1) because the fraud order interferes with the freedom of communication of the senders of the undelivered mail, and (2) because it affects mail other than that connected with the fraud. We shall consider each of these objections.

2. *The Rights of the Senders*

A. RESPONDENTS HAVE NO STANDING TO ALLEGE THAT THE CONSTITUTIONAL RIGHTS OF THE SENDERS ARE INFRINGED

In the first place we submit that respondents are hardly in a position to invoke the constitutional right to free expression of the senders of the undelivered mail, who are the victims of respondents' scheme and who are themselves not complaining. This Court has stated, citing many cases, that: "* * * it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576. See also *Virginian Ry.* v. *System Federation*, 300 U. S. 515, 558; *Erie R. Co.* v. *Williams*, 233 U. S. 685, 697; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338, 349; *Blair* v. *United States*, 250 U. S. 273, 282; *Blackmer* v. *United*

States, 284 U. S. 421, 442. This principle was recently reaffirmed in the *Virginian Ry.* case, *supra,* wherein the Court stated: "The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees."

The *Jeffrey* and *Viriginian* cases are closely analogous. Each of them involved statutes designed to afford employees additional rights against their employers. In each case the employer against whom the statute was invoked sought to defend on the ground that the constitutional rights of the employees, or of some of them, were violated, and that as a result of unconstitutionality in the alleged respect the statutory provisions were wholly void. In those cases, as in this one, although the compiainant was harmed by the statute he was not affected by the particular constitutional objection under consideration. It was obviously anomalous for the Court to pass upon a claim of deprivation of the constitutional rights of the victimized class at the exclusive instance of the persons against whom the victims were being protected. There is as much reason for the Court to refuse to do so here.

In his dissenting opinion in *Leach* v. *Carlile,* 258 U. S., at 140, Mr. Justice Holmes cited *Buchanan* v. *Warley,* 245 U. S. 60, in support of the right of the recipients to invoke the constitutional rights of the senders of the letters. But in the case cited the white plaintiff had

entered into a contract to sell his property to a colored person, and the ordinance discriminating against colored people, if valid, interfered with his right to sell his property as well as with the right of the colored person to occupy it. He was thus relying upon a direct impairment of his own property rights, not upon a violation of the rights of Negroes. In the instant case we have already demonstrated that no constitutional right of the recipients is violated. *Buchanan* v. *Warley* itself indicates that to the extent that respondents here must rely on an alleged interference with the rights of senders of the letters they come "* * * within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights." (245 U. S., at 73.)

B. THE FRAUD ORDER DOES NOT UNCONSTITUTIONALLY INTERFERE WITH THE SENDERS' FREEDOM OF COMMUNICATION

Even if we assume that respondents have standing to claim that the constitutional rights of the senders are infringed there would be no substance to the contention.

(i) *The incoming mail was an integral part of the fraudulent scheme.*—In the first place, the incoming mail was an integral part of the fraudulent scheme. In this case the mail addressed to the Puzzle Contest and the Puzzle Contest Editor would contain contest fees, the puzzles themselves

(presumably sent with the fees), and inquiries as to the contest. Even though the senders of these letters would not be violating any law, the letters are essential to the success of the fraud; indeed they are its very object. If the First Amendment does not protect fraudulent commercial advertising—that is, dishonest statements made to induce persons to part with their money—we think that it also does not protect the receipt by the defrauders of the replies from the victims of the scheme. Thus it is undoubtedly within the authority of the legislative branch of the Government to prohibit the receipt by kidnappers of communications with respect to ransoming of the victims, or by lotteries of incoming contributions relating to the unlawful scheme without running afoul of the First Amendment—and this irrespective of whether the payment of the ransom by the victim's family or the transmission of payment for the lottery tickets is itself independently illegal. And the power is not any the less a lawful means of defending the public against the vices of lotteries and kidnapping because the senders of the communications may not wish them to be intercepted.

A fraudulent scheme which consists both of outgoing false representations and the incoming fruits of the misrepresentations falls in the same category. That the letters are an inherent part of the scheme is shown by the fact that the defrauder may be punished because he has caused

his victim to use the mails whether or not he has used them himself. *United States* v. *Guest*, 74 F. 2d 730 (C. C. A. 2), certiorari denied, 295 U. S. 742; *Corbett* v. *United States*, 89 F. 2d 124 (C. C. A. 8); *Stapp* v. *United States*, 120 F. 2d 898 (C. C. A. 5); *Kann* v. *United States*, 323 U. S. 88, 94.[29] Cf. *United States* v. *Sheridan*, 329 U. S. 379.[30]

(ii) *The incoming letters do not contain speech protected by the First Amendment.*—Apart from this, even if we assume that the incoming letters are not a part of the fraudulent scheme, it does not follow that the First Amendment guarantees the freedom of such communications, for those incoming letters are themselves not expressions of that type of speech which is protected by the First Amendment. They consist of replies to respondents' advertisements which would contain contest fees and puzzles and inquiries about the contest. They thus relate to the same commercial transactions as the false advertising itself and are as much related to the commercial enterprise as are the orders or inquiries sent in by pro-

[29] In the *Kann* case the use of the mails by the bank was after the fraud had been consummated; the Court noted that: "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States* v. *Kenofskey*, 243 U. S. 440." (323 U. S. at p. 94).

[30] Although this case arose under a statute relating to interstate commerce, the transmission of the checks was undoubtedly through the mails.

spective purchasers in response to the advertising in a mail order catalogue. They thus fall within the class of commercial statements not protected by the First Amendment.

To the extent that what has been said with reference to the character of the incoming letters is not wholly accurate in the sense that there may be some small element of "speech" contained in those letters, the "'accepted constitutional doctrine that these fundamental human rights are not absolutes'" (*United Public Workers* v. *Mitchell,* 330 U. S. 75, 95) comes into play. For whatever element of protected speech is contained in the letters, it is strikingly insubstantial as compared with the legitimate interest of the Government in protecting the public against fraud.

Where a substantive constitutional power would authorize some restrictions upon speech or communication, this Court necessarily balances the interests involved—the extent and importance of the impairment of the essential freedoms guaranteed by the Constitution as against the need for effectuation of the substantive power also authorized by the Constitution. See *Pennekamp* v. *Florida,* 328 U. S. 331, 336. Thus in *Prince* v. *Massachusetts,* 321 U. S. 158, this Court held that the State could prohibit religious activities in the public streets by children because of its power over the wellbeing of children, even though the same activities by adults would be

protected by the First Amendment. See also *Cantwell* v. *Connecticut*, 310 U. S. 296, 306, in which the Court stated:

> * * * Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

In *United Public Workers* v. *Mitchell, supra*, the Court was concerned with the power of Congress to control the conduct of government employees in a manner which would have been in violation of the First Amendment if applied to the public generally. In the cases involving the authority of courts to punish for criticism of judicial acts during the course of pending litigation the Court has been faced with the necessity of weighing the effect of the criticism upon the impartial and ordinary administration of justice as against the guaranty of a free press. *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331; *Craig* v. *Harney*, 331 U. S. 367. That the right to free speech may be restricted in order to prevent violence and disorder is, of course, not open to doubt. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *United Public Workers* v. *Mitchell, supra*. And the cases holding picketing to be a form of speech protected by the First Amendment have recognized that

not only violence but false representations are not "constitutional prerogatives." *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 295; *Thornhill* v. *Alabama*, 310 U. S. 88, 104.

It is to be noted that these cases and many others which stress the importance of the First Amendment are concerned with "the liberty to discuss publicly and truthfully matters of public concern" (*id.*, at 101), with the dissemination of ideas and information. Thus *Near* v. *Minnesota*, 283 U. S. 697, and the contempt cases involved such vital matters as the right of the press to criticize public officials, one of the basic liberties which the First Amendment was meant to safeguard.

We think there can be no question as to how these principles should be applied here—even if it be assumed *arguendo* (but in our view incorrectly) that statements made in connection with a fraudulent advertising scheme are of a type to which the First Amendment applies. For on the one hand there is the undoubted constitutional power to protect the public against fraud and deception—a governmental authority as well recognized as the power to prevent violence and disorder. And that authority is here being applied not to any allegedly fraudulent statement in the discussion of public issues, or in the criticism of public officials, or in the attempt to disseminate the ideas of religious or labor organizations. Here the restriction upon the delivery of mails is desired solely for the purpose of guard-

ing the public against commercial enterprises found to have used the mails to defraud. The restriction applies to a single means of communication and only to the particular address to which it must relate if the public is to be protected, after a finding that that address is being used in connection with a fraudulent scheme. Since most mail sent to the proscribed address would normally relate to the fraudulent scheme, the subject matter of the prohibition is narrowly confined.

It is thus apparent that the freedom of speech and communication of the senders of such mail, upon which respondents must rely, is impaired only to the slightest extent. The senders, most of whom are the victims of the fraudulent scheme, are precluded from writing letters and sending money to a single enterprise; if they send money, their rights are "impaired" by having it returned to them. The primary subject which the fraud order will have the effect of preventing them from "discussing" is the fraudulent contest. And, as we have seen, the object of the scheme is their own protection and none of them are complaining. On the contrary, the Post Office Department, institutes its proceedings under the statutes here involved as a result of complaints from the class whose constitutional rights the statutes are alleged to have infringed (*e. g.* R. 84).

Clearly in these circumstances any interference

with the freedom of speech of the senders of the letters is so negligible as to be in practical effect non-existent. Certainly it does not in the slightest counterbalance the benefit to the public interest from using the only effective method of completely protecting the public against being fleeced as a result of the fraudulent use of the mails.

The same conclusion follows if the balancing of interests is expressed in terms of the "clear and present danger" test.[21] For under that test, as classically stated:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. [*Schenck* v. *United States*, 249 U. S. 47, 52].[22]

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[21] In *Pennekamp* v. *Florida*, 328 U. S. 331, 336, the Court seemingly assimilated the "clear and present danger" test to the balancing of the conflicting constitutional interests, when it stated that "under any one of the phrases ["clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct"], reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

[22] For other cases applying the test, see *Herndon* v. *Lowry*, 301 U. S. 242, 256; *Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Bridges* v. *California*, 314 U. S. 252, 261; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Hartzel* v. *United States*, 322 U. S. 680, 687; *Thomas* v. *Collins*, 323 U. S. 516, 527; *Pennekamp* v. *Florida*, 328 U. S. 331, 335, 352–353; *Craig* v. *Harney*, 331 U. S. 367.

Unquestionably mail fraud is a "substantive evil that Congress has a right to prevent", and both the fraudulent representations and the incoming mail to the person making them are clearly and presently, or directly and immediately, calculated to bring about the evil. There can thus be no question but that the clear and present danger standard is satisfied.

3. *The statutes do not violate the First Amendment because the fraud orders may apply to commingled mail not related to the fraud*

In this case the fraud order will apply, as we have shown, *supra,* pp. 3–4, only to money sent in to respondents' contest and to mail addressed to the Contest and the Contest Editor. We do not believe that we are faced with a situation in which private or innocent mail unrelated to the fraudulent scheme will also be halted. But if the contrary be assumed, what we have said would apply with only slightly less force.

For, on the one hand, when a person who uses the mail to perpetrate a fraudulent scheme employs an address at which innocent mail will inevitably be commingled with that related to the fraud, he makes it impossible for the proceeds of his fraud to be cut off and returned to the victim unless all mail deliveries to that address are stopped. See pages 34–39, *supra.* The person engaging in such an unlawful enterprise should not be able to prevent interruption of the fraudulent scheme because of an inability to segregate two

classes of mail for which he is responsible. The harm to the public, whom Congress had constitutional authority to protect against fraudulent use of the mails, if all commingled mail was required to be delivered thus needs no elaboration. See pp. 35–37.

This, we think, far outweighs the interference with the freedom of expression of those who wish to write to the proscribed address. For even as to those whose letters might deal with other subjects, there is no general impairment of their right to express themselves, to disseminate ideas, to participate in discussion of any subject, but only an inability to communicate, through one medium, albeit an important one, with a single addressee. A similar disability to communicate might result if the addressee were imprisoned, because of his fraud or otherwise, but no one would suggest that such an interference with the rights of those who wished to write him would violate the First Amendment.

Even where free speech is concerned a person cannot take advantage of the intermingling of that which is lawful with that which is not so as to immunize the unlawful from governmental control. *Valentine* v. *Chrestensen*, 316 U. S. 52, discussed *supra*, pp. 44–46. The well-established principle as to the exercise of power in other fields over commingled activities, as well as the common law doctrine of confusion of goods (both of which are discussed, *supra*, pp. 37–39) confirm

our position that the inseparability of mail relating to the fraud and other mail does not defeat the power to safeguard the public against fraud.

D. THE FRAUD ORDER STATUTE IS NOT INVALID AS AUTHORIZING PREVIOUS RESTRAINT ON SPEECH

Mr. Justice Holmes' dissent [33] in *Leach* v. *Carlile*, 258 U. S. at 140–141, suggests that the fraud order statute runs afoul of the general understanding of the First Amendment as "intended to prevent previous restraints." But both the fraudulent representations and communications and the responses to them are, as we have shown, an integral part of the fraudulent scheme and commercial in their nature, so that they are the kind of "speech" to which the First Amendment does not apply. To the slight extent that the fraud order might affect innocent incoming mail, the interest in protecting the true "speech" of the letter-writers is far outweighed by the interest in the protection of the public against mail fraud. Accordingly, we do not believe that the "previous restraint" doctrine is applicable here.

The authorities which support this statement are cases in which the point was never raised, inasmuch as heretofore (apparently outside of the dissent in *Leach* v. *Carlile*) no one had suggested that the First Amendment prohibited the enjoining of fraudulent advertising schemes. The orig-

[33] Mr. Justice Holmes' opinion implies that he was concerned with a previous restraint upon the senders of the letters rather than a previous restraint upon the false representations themselves.

inal Federal Trade Commission Act empowered the Commission and the Circuit Courts of Appeals to issue cease and desist orders against unfair methods of competition in interstate commerce which, as this Court knows, included false advertising. The cease and desist orders were, of course, the equivalent of injunctions when affirmed by the Circuit Courts of Appeals. It has never been suggested that this form of previous restraint upon fraudulent advertising contravened the First Amendment. In 1938 the Federal Trade Commission Act was amended so as to make it unlawful for any person to disseminate false advertisements through interstate commerce or the mails. Section 12, as added, 52 Stat. 114, 15 U. S. C. 52. Section 13 of the amended Act authorized the Commission to apply to a district court for an injunction against continued dissemination of the false advertisement pending the completion of the proceeding before the Commission. This section, which has been upheld and applied in *Federal Trade Commission* v. *Thomsen-King & Co.*, 109 F. 2d 516 (C. C. A. 7), of course, imposes a previous restraint upon false advertising.

The statutes administered by the Securities and Exchange Commission also provide for enforcement by injunction. Securities Act, Section 20, 48 Stat. 86, 15 U. S. C. 77t; Securities Exchange Act, Section 21, 48 Stat. 899, 15 U. S. C. 78u; Public Utility Holding Company Act, Section 18,

49 Stat. 831, 15 U. S. C. 79r (f). These statutes and provisions have frequently been applied so as to enjoin the use of the mails by a person found to have been engaged in unlawful conduct. *E. g., Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419; *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U. S. 344; *Securities and Exchange Commission* v. *Howey Co.,* 328 U. S. 293; *Securities and Exchange Commission* v. *Jones,* 15 Supp. 321 (S. D. N. Y.), affirmed, 85 F. 2d 17 (C. C. A. 2), certiorari denied, 299 U. S. 581; *Securities and Exchange Commission* v. *Universal Service Ass'n,* 106 F. 2d 232 (C. C. A. 7), certiorari denied, 308 U. S. 622; *Timetrust* v. *Securities and Exchange Commission,* 142 F. 2d 744 (C. C. A. 9); *Securities and Exchange Commission* v. *Thomasson Panhandle Co.,* 145 F. 2d 408 (C. C. A. 10). The object of the Securities Act, like that of the Federal Trade Commission Act and the mail fraud statutes, was to protect the public against fraud.

The cases sustaining or indicating the validity of licensing requirements for the distribution of commercial advertising, pamphlets or leaflets, as distinct from statements designed to disseminate ideas, also demonstrate that the doctrine of "previous restraints" has no place in this field. For the licensing system was held invalid as applied to religious literature in such cases as *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Schneider* v.

State, 308 U. S. 147, in part because it constituted a previous restraint upon speech. The basic assumption in those opinions (see pp. 46–50, *supra*) that a licensing system would have been valid in so far as commercial announcements were concerned shows that the latter are not protected by any "previous restraint" doctrine. See, e. g., *Schneider* v. *State, supra,* at 163, 165; *Cantwell* v. *Connecticut,* 310 U. S. 296, 366; *Valentine* v. *Chrestensen,* 316 U. S. 52; *Jamison* v. *Texas,* 318 U. S. 413, 417. See, also, *Baccus* v. *Louisiana,* 232 U. S. 334 (licensing of commercial itinerant hawkers); *Emert* v. *Missouri,* 156 U. S. 296 (same); *Cusack Co.* v. *City of Chicago,* 242 U. S. 526 (prohibition against bill boards); *San Francisco Shopping News Co.* v. *City of South San Francisco,* 69 F. 2d 879 (C. C. A. 9), certiorari denied, 293 U. S. 606 (prohibition against distribution of advertising matter "on any porch or yard not in possession or under control of person".).

This Court has recognized that the doctrine of "previous restraints", which was designed to preserve the freedom of newspapers and others freely to participate in the discussion of public affairs, is not an absolute one. *Near* v. *Minnesota,* 283 U. S. 697, 716. Among the enumerated class of "exceptional cases" the Court in that case included the public interest in decency, observing that "the primary requirements of decency may be enforced against obscene publications." (*Ibid.*) The public concern with decency in publications would

appear to be of no greater magnitude than the interest in protecting the public against fraud. If the First Amendment applies to the type of mail here involved at all (and only if it does could the "previous restraint" doctrine be applicable), we submit that the public interest in safeguarding these written statements is so slight, as contrasted with the interest in preventing fraud, as clearly to justify holding this situation within the exceptions to the "previous restraint" rule.

III

THE FRAUD ORDER STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

We have shown in Point I, *supra*, p. 27, that the fraud order statutes are a valid exercise of the postal power, that the provisions for returning all money and mail matter are a reasonable means of giving effect to the legitimate congressional objective of protecting the public against use of the mails to defraud. As this Court declared with respect to the commerce power: "Even though Congress, in the choice of means to effect a permissible regulation of commerce [and, we add, of the mails] must conform to due process [citing cases], it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clauses." *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 558.

Argument is unnecessary to show that the due process clause does not prohibit legislation directed at preventing fraud or deception. *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Carolene Products Co.* v. *United States*, 323 U. S. 18; *Sage Stores Co.* v. *Kansas*, 323 U. S. 32; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 302–303; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556–557; Federal Trade Commission Act; Securities Act; Food, Drug and Cosmetics Act. This power unquestionably extends to the prevention of fraud through the mails.

It is, of course, true that the means selected to attain a legitimate objective must be reasonably related to that end in order to comply with due process. But here the return of money and mail to the senders is clearly related to protecting the public against being harmed through the use of the mails to defraud. It both prevents the schemer from securing the fruits of his fraud and guarantees the victims against loss. Indeed, it is probably the only fully effective method of accomplishing the latter important result.

For Congress to require the return of all mail sent to the proscribed address is also reasonably related to the accomplishment of the legislative objective. For, as we have seen, since a postmaster cannot know which mail sent to a particular address is related to the fraudulent scheme, he must return all mail if the mail relating to

the fraud is to be stopped. This Court is respectfully referred to Point I, pp. 32–39, *supra, for a* more elaborate exposition of the reasonableness of these requirements.

IV

THE FRAUD ORDER STATUTES DO NOT VIOLATE OTHER PROVISIONS OF THE CONSTITUTION

Respondents, in their letter to the Clerk of this Court, have indicated their intention to urge that the code provisions also violate the Fourth, Sixth, and Eighth Amendments and Article III, Section 2, Paragraph 3 of the Constitution. These constitutional objections may be disposed of briefly.

A. THE FOURTH AMENDMENT

This Court in one of the earliest decisions as to the breadth of the postal power indicated that the Fourth Amendment precluded a postmaster from opening sealed letters without a warrant. *Ex parte Jackson,* 96 U. S. 727, 735. In accordance with this admonition Congress has explicitly prohibited the Post Office Department from opening the mails—and it is indeed as a result of this restriction that the fraud orders must extend to all mail sent to a particular address and not merely to mail connected with the fraud. But, apart from this, it is difficult to see how the Fourth Amendment is relevant. For the letters which are returned to the senders do not come into the recipients' possession and do not belong to the recipients.

Public Clearing House v. *Coyne*, 194 U. S. 497, 511. They belong to the senders to whom they are returned. There is thus obviously neither a search nor a seizure in the failure to deliver.

B. THE SIXTH AND EIGHTH AMENDMENTS AND ARTICLE III, SECTION 2, PARAGRAPH 3

The Sixth Amendment and Article III, Section 2, Paragraph 3 of the Constitution provide for trial by jury and other guaranties in criminal prosecutions. The Eighth Amendment prohibits excessive fines and cruel and unusual punishments. The argument that the fraud order statutes contravene these constitutional provisions will presumably rest on the claim that the statutes are criminal in nature.

But the purpose of refusal to deliver the mail is to protect the public against fraud in the only way which in practice will be effective. As this Court has stated in *Degge* v. *Hitchcock*, 229 U. S. 162, 171: "the statute was passed primarily for the benefit of the public at large and the order was for them and their protection." And again more recently in *Commissioner* v. *Heininger*, 320 U. S. 467, 474, the Court stated that:

> The single policy of these sections is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators; such punishment is provided by separate statute, and can be imposed only in a judicial

proceeding in which the accused has the benefit of constitutional and statutory safeguards appropriate to trial for a crime.

The fact that respondents may suffer financial or other injury by reason of the inability to receive mail does not mean that the proceeding is criminal within the meaning of the constitutional provisions. *Ex parte Quirin,* 317 U. S. 1, 40; *Capital Traction Co.* v. *Hof,* 174 U. S. 1; *Shields* v. *Thomas,* 18 How. 253; *United States* v. *Zucker,* 161 U. S. 475. The same can be said of all the many familiar situations in which unlawful practices may be restrained in advance in order to protect the public, whether by way of abatement of nuisance, through the issuance of injunctions by courts of equity, or through administrative cease and desist orders. In many cases administrative sanctions necessary for the protection of the public have been sustained although very damaging to the respondent. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398 (suspension of retail fuel oil dealer under OPA regulations); *Brown* v. *Wilemon,* 139 F. 2d 730 (C. C. A. 5), certiorari denied, 322 U. S. 748 (suspension of gasoline distributor under OPA regulations); *Nelson* v. *Secretary of Agriculture,* 133 F. 2d 453 (C. C. A. 7) (suspension of trader from contract market under Commodity Exchange Act); *Wright* v. *Securities & Exchange Commission,* 112 F. 2d 89 (C. C. A. 2) (expulsion of members of national securities exchanges under Securities Exchange

Act of 1934); *Farmers' Livestock Commission Co.* v. *United States*, 54 F. 2d 375 (E. D. Ill.) (suspension of market agencies under Packers and Stockyards Act). It is also well established that courts may impose civil as well as criminal sanctions as a means of law enforcement, and that the civil sanctions are not governed by the constitutional provisions applicable to criminal prosecutions. *Helvering* v. *Mitchell*, 303 U. S. 391, which reviews the cases in this field, held that the provision for a 50% additional penalty for wilful income tax violation was a civil rather than a criminal sanction.

CONCLUSION

We respectfully submit that the fraud order, as modified, is within the Postmaster General's statutory authority, and that such statutory authority is not in conflict with any provision of the Constitution. For the reasons urged herein and in the government's preceding brief, the judgment below should be reversed.

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DECEMBER, 1947.

APPENDIX A

R. S. § 3929 (39 U. S. C. 259), as amended by the Act of September 19, 1890, c. 908, § 2, 26 Stat. 465, 466, provides as follows:

> SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to him-

self. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

R. S. § 3929 was further amended by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964, to cover not only registered letters but all letters or other matter sent by mail:

> SEC. 4. That the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail.

R. S. § 4041 (39 U. S. C. 732), as amended by the Act of September 19, 1890, c. 908, § 3, 26 Stat. 465, 466, provides as follows:

> SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any post-

master to said person or company of any postal money-orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.

APPENDIX B

DECEMBER 24, 1947.

Hon. PHILIP B. PERLMAN
Solicitor General,
Department of Justice, Washington, D. C.

Re: *Hannegan* v. *Read Magazine, Inc.*

DEAR MR. PERLMAN: In accordance with your request, I am setting forth herein a brief description of Post Office Department procedure in the issuance, revocation and modification of fraud orders.

In calling upon concerns and individuals to show cause why fraud orders shall not be issued against them, it is now, and has been for many years, the practice to name as respondents in the show cause notice all of the names which the evidence before the Department at the time of the issuance of the notice indicates are then being used to obtain remittances through the mails pursuant to the alleged fraudulent scheme.

Frequently proof adduced at the hearing on behalf of the respondent discloses that certain of the names called upon should not be covered by the fraud order, and in such instances it has been the practice to eliminate such names from the order when issued.

In other instances evidence adduced at the hearing by counsel for the respondent has been directed to a defense of the scheme as a whole, and counsel have neglected to develop evidence which would have shown that certain of the persons or

concerns named as respondents were improperly so named, or that they played such a minor role in the consummation of the scheme that their names could have been eliminated without affecting the effectiveness of the order when issued. After the issuance of the fraud order, if it is shown that certain names should not have been included therein, it has been the practice to revoke so much of the order as covered those names. There have been a great many such cases; a number of our orders of this type have been made available to your office for examination.

After an order has been in effect a sufficient length of time to insure the suppression of the scheme against which it is aimed, it has long been the practice of the Department to revoke it on a showing that the scheme has been suppressed and will not be resumed. Many such orders against personal names of individuals have been revoked. The duration of such orders is essentially dependent upon the willingness of the promoter to give assurance of the abandonment of the fraudulent scheme.

Previous to November 20, 1947, there was no formal procedure whereby a person or concern against whom a fraud order had been issued could petition the Postmaster General to revoke or modify the order. The practice in granting these applications for revocation was therefore informal. On November 20, 1947, the rules and regulations applicable to fraud hearings were amended to provide a formal method of revocation and modification of fraud orders. See 12 F. R. 7944 (Sec. 51.28). After an application has been received by the Post Office Department ask-

ing for a modification or revocation of a fraud order, it has been, and still is, the practice to request the inspection service to conduct an investigation to determine whether the person or concern against whom the fraud order was issued had discontinued the fraudulent enterprise either under the names set forth in the fraud order or under any other names. If the report of the inspector shows that the fraudulent scheme has been discontinued, the order is either revoked or modified in accordance with the prayer contained in the application or petition. On the other hand, if the report of the inspector shows that the person or concern against whom the fraud order was issued is conducting the fraudulent scheme under other names, or intends to conduct the scheme under the names set forth in the fraud order should the order be revoked or modified, the application is denied.

It has long been the policy of the Department to attempt to include in fraud orders only such names as are necessary to effectively suppress the scheme against which the order is issued, and to revoke the order on a showing that the scheme has been suppressed. Most of the fraud orders revoked have been those issued against the personal names of individuals. Trade names employed in the promotion of fraudulent schemes through the mails are almost invariably so closely identified with the scheme suppressed by the fraud order that the name has no independent valve or use, and such orders are not ordinarily revoked unless it is established that they were improperly issued. However, in a few instances, orders against trade names have been revoked

upon a showing that their inclusion was not essential to the suppression of the fraudulent scheme. An instance of this sort is Fraud Order No. 7112, F. & L. Docket 10/131, against the U. S. Spectacle Company and other names employed by Benjamin Ritholz, a repeat offender, who had used some thirty different business names in a mail order spectacle swindle. The order was modified to eliminate therefrom the name "Dr. Ritholz Optical Company."

A large percentage of all fraud order cases are concluded upon the basis of voluntary discontinuance of the scheme described in the charges served upon the promoters. During the fiscal year 1946 the Solicitor of the Post Office Department issued 239 citations to show cause why fraud orders should not be issued against 672 names of persons and concerns. Compromise settlements were effected in 123 of those cases, involving 323 names of persons and concerns. During the same period 100 fraud orders were issued, and no action was taken in eight cases because of insufficient evidence.

The fraud order statutes have never been interpreted by the Department as requiring the issuance of a fraud order against a large and otherwise legitimate concern for the incidental sale of some article through the mails by misleading advertising. While charges have been issued in a few such cases, settlement has invariably been had upon agreement without fraud order. An instance of this sort is a case which arose in October, 1940, F. & L. Docket No. 13/120, in which a large New York department store was served with charges and notice to show cause.

The case was settled without hearing upon assurances that the sale of the misrepresented article would be discontinued. Under present practice formal charges would not have been served upon the store, but its attention would have been called to the objectionable advertising so that it might be discontinued.

Sincerely yours.

JESSE M. DONALDSON,
Postmaster General.

U. S. GOVERNMENT PRINTING OFFICE: 1947